IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 280

LOUIS HARDY STRICKLAND,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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To: The Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States of America.

Petitioner, Louis Hardy Strickland, respectfully prays for a writ of certiorari to the Supreme Court of North Carolina to review the final judgment entered on the 17th day of April, 1957, affirming the judgment of the Superior Court of Wake County, North Carolina. The Rules of the Supreme Court of North Carolina prohibit the filing of petitions to rehear in criminal cases. (Clerk certificate) State vs. Council 129 NC 511, 39 SE 814).

OPINION BELOW

The Plea of Former Jeopardy was denied by the Judge Presiding in the Superior Court of Wake County North Carolina. The Opinion of the Supreme Court of North Carolina is contained in the Appendix.

JURISDICTION

The jurisdiction of the court is invoked under Act of June 25, 1948, 28 U. S. C. Section 1257 (3)

SUMMARY STATEMENT

Petitioner was indicted in the Superior Court of Wake County, North Carolina at the June 1955 Criminal term as follows: The Jurors for the State upon their oath present; that Louis Hardy Strickland et als on the 23rd day of April, 1955 with force and arms at and in the county aforesaid quantity of meat of the value of fifteen hundred dollars, of the goods, chattels and moneys of one R. & S. Packing Company then and there being found feloniously did steal, take and carry away, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State. 2nd count. And the jurors for the State upon their oath aforesaid do further present that the said Louis Hardy Strickland et als on the day and year aforesaid, with force and arms at and in the County aforesaid the said quantity of meat of the value of fifteen hundred dollars aforesaid of the goods, chattels and moneys of the said R. & S. Packing Company before then feloniously stolen, taken and carried away, feloniously did receive and have the said Louis Hardy Strickland then and there well knowing said goods, chattels and moneys to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. Defendant pleaded not guilty. Case tried and jury returned verdict of guilty. Appealed. Supreme Court of North Carolina (November 2, 1955) Parker, Justice entered

the following opinion: "Judgment arrested. "The opinion of the Supreme Court of North Carolina disposing of the first appeal is reported in 243 NC 100; 89 SE 2nd 781." Subsequently at the December 1955 term of Superior Court of Wake County, North Carolina the petitioner was indicted as follows: "The jurors for the state upon their oath present that Louis Hardy Strickland, late of the County of Wake on or about the 1st day of March, 1955 with force and arms at and in the county aforesaid, a certain storehouse, dwelling house and building occupied by one R. & S. Packing Company, Inc. where merchandise, chattels, valuable securities were and were being kept, unlawfully and feloniously did break and enter with intent to steal, take and carry away the merchandise, chattels, money, valuable securities of the said R. & S. Packing Company, Inc. against the form of the Statute (G. S. 15-54) in such cases made and provided and against the peace and dignity of the State. 2nd count: The jurors for the State upon their oath aforesaid, do further present that the said Louis Hardy Strickland afterwards, to wit: on the day and the year aforesaid with force and arms at and in the county aforesaid, the said 60 pounds of weiners of the value of $25.00 aforesaid of the goods, chattels, and monies of the said R. & S. Packing Company, Inc. were then feloniously did receive and have the said Louis Hardy Strickland then and there well knowing said goods, chattels and monies to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State. (L. V. CHALMERS, JR., Solicitor)

At the Wake County June 1956 term of court case called for trial. Petitioner entered a plea of former acquittal, plea denied and then pleaded not guilty. Jury convicted petitioner and sentenced. "confined in Central Prison at Raleigh for a term of not less than three years nor more than five years on the breaking and entering count" and on the larceny count "be confined in the common jail of Wake County for a term of six months." Petitioner appealed and the Supreme Court of North Carolina on the 17th day of April, 1957 entered the following opinion and judgment, "PER CURIAM: Defend-

ant's plea of former jeopardy has no merit. The bill of indictment returned in July 1955 charged no criminal offense. He is now, for the first time, charged with the criminal offense of which he stands convicted. S.V. Strickland 243 NC 100, 89 SE2nd 781. The motion to quash is without merit. S.V. Mincher 178 NC 698, 100 SE 339. Defendant's other assignments of error have been examined and have been found to be equally wanting in merit."

RAISING OF FEDERAL QUESTION

The Federal Question sought to be reviewed, to wit: whether the petitioner was twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth Amendment and Fifth Amendment to the Constitution of the United States of America. The plea of former jeopardy was made when petitioner was placed on trial the second time and was denied and made the subject of exception. The Supreme Court of North Carolina (ex mero motu) held the bill of indictment fatally defective and Judgment arrested. The Supreme Court of North Carolina in the opinion affirming the judgment of the Superior Court of Wake County, held that the Superior County properly overruled defendant's plea of former jeopardy and in so holding could not have rendered judgment without deciding that the petitioner was not twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

QUESTION PRESENTED

Was the Petitioner twice put in jeopardy and deprived of his liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The instant case is within the statutory provision relied on to confer jurisdiction on this court. Petitioner respectfully

contends that the following authorities sustain his contention that this Court has jurisdiction of and should take cognizance of the instant case as being within the provisions of 28 U. S. C. SEC 1257 (3); Wilson vs Cook, 327 U. S. 474, 66 S. Ct. 663; 90 L. ED. 793, in which the court said (66 S. CT. 663 at 666) . . . . ."This jurisdiction requirement is satisfied only if the record shows that the question of validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the State (citing authority) or has in fact been decided by it, (citing authorities) and that its decision was necessary to the judgment." (citing authorities) HONEYMAN VS HANAN 300 U. S. 14,57 S CT. 350; 81 L ED 476 in which the court said (57 S CT 350 at 353) . . . . . "It must appear that its decision was necessary to the determination of the cause and that it was actually decided, or that the judgment was rendered could not have been given without deciding it." (citing cases) See also WILLIAMS VS KAISER 329 US 471, 65 S CT 363, 89 L ED 398; TILT VS KELSEY 207 US 43, 28 S CT 1, 52 L ED 95 CHAMBERS VS BALTIMORE & OHIO R. R. CO. 207 US 142, 28 S CT 34, 52 L ED 143. The Court has taken cognizance of cases in which the contention was made that double jeopardy deprives a defendant of a right in violation of the due process clause of the Fourteenth Amendment and the Fifth Amendment of the Constitution of the United States of America. (STATE OF LOUISIANA VS. RESWEHR, 329 US 459, 67 S CT 374, 91 L ED 422. See also dissenting opinion of Mr. Justice HARLAN in Hurtado vs People of the State of California, 110 US 547 4 S CT 111, 292, 28 L ED 232)

In the case of Louisana vs Reswehler 329 U. S. 459 at page 462 Justice Frankfurter stated, "Insofar as due process under the Fourteenth Amendment requires the State to observe any of the immunities, 'that are valid as against the Federal Government by force of specific pledges of particular amendments it does so because they have been found to be implicit in the concept of ordained liberty and thus through the Fourteenth Amendment becomes valid as against the state'." P. 469 "In short the due process clause of the Fourteenth

Amendment did not withdraw the freedom of a State to enforce its own notions of fairness in the administration of criminal justice, unless, as it was put for the court by Mr. Justice CORDOZO, "In so doing it offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked fundamental." Justice Frankfurter, "A State may offend such a principal of justice by subjection of an individual to successive retrials on a charge on which he had been acquitted. Such conduct by a State might be a denial of due process but not because the protection against double jeopardy in a Federal Prosecution against which the Fifth Amendment safeguards limit a State. Also see IN RE BRADLEY 318 U. S. 50; EX PARTE LANGE 18 WALL 163) "Assuming but not deciding that violation of the principle of double jeopardy provisions of the Fifth Amendment and the cruel and unusual punishment of the Eighth amendment would violate the due process clause of the Fourteenth Amendment. (SEE TWINNING VS N. J. 211 US 78; POLKO VS CONNECTICUT 302 US 319; IN RE KEMMLER 136 US 436; COLLINS VS JOHNSTON 237 US 502, 510.)

In the instant case it is respectfully contended that the question as to whether petitioner was placed in double jeopardy was expressly raised and passed on by the Superior Court of Wake County, North Carolina and the Supreme Court of North Carolina, and was properly excepted to and made the subject of appeal.

Petitioner respectfully submits that the decision herein operates so as to place petitioner in double jeopardy thereby depriving him of his liberty without due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States of America.

The Supreme Court of North Carolina in the opinion disposing of the first appeal held that the bill of indictment in both counts to be fatally defective and for that reason judgment was arrested, "ex mero motu." Petitioner submits that this was the equivalent of sustaining a demurrer; "ex mero motu."

In EWELL'S BLACKSTONE 2nd Edition ESSENTIALS OF THE LAW P. 600 Quote

Arrest of judgment arises from intrinsic causes appearing upon the face of the record. If the case laid in the declaration is not sufficient in point of law to found an action upon; and this is invariable rule with regard to arrest of judgment upon matter of law "that whatever is alleged in arrest of judgment must be such matter as would upon a demurrer have been sufficient to overturn the action or plea."

Petitioner submits and recognizes the principal of law set forth in UNITED STATES vs. BALL 163 US 663 P. 666. In England an acquittal upon an indictment so defective that if it had been objected to at the trial, or by motion in arrest of judgment etc it would not have supported any conviction or sentence has generally been considered as insufficient to support a plea of former acquittal."

The foundation of that doctrine in Vaux case (4 Rep 44) Special verdict that Ridley killed by taking poison and that Vaux was not present when he took it and a judgment rendered thereon that the poisoning of Ridley and persuading him to take the poison as found by the verdict was not murder and that the defendant go without day. Hearing on the plea of autrefois acquit the court of Queens Bench was of opinion that Vaux was a principal although not present when Ridley took the poison but that the indictment was insufficient for not expressly alleging that Ridley drank the poison and for that reason he was not legitimo modo acquietatus nor was the life of the party in the judgment of the law ever in jeopardy.

"Yet the decision in Vaux case was treated both by Lord Coke and by Lord Hale as maintainable only upon the ground that the judgment upon the first indictment was QUOD EAT SINE DIE which might be given as well for the insufficiency of the indictment as for the defendant's not being guilty of the offense and Lord Hale was clearly of the opinion that a judgment "quod eat inde quietus" could not go to the insuf-

ficiency of the indictment but must go to the matter of the verdict and would be a perpetual discharge." (3 Inst 214; 2 Hale P. C. 394,395) "And Mr. Starkie has observed, 'the doctrine observed in this case does not appear to consist with the general principal on which the plea of autrefois acquit is said to depend, since an acquittal upon a special verdict would leave the defendant exposed to a second presecution whenever a formal flaw could be detected in the first indictment at any subsequent period. (Stark Crim. Pl. 320.)

Leading American case PEOPLE VS BARRETT 1 Johns 66

"While a majority of the court consisting of Chief Justice Kent and Justice Thompson and Spencer followed the English authorities Justices Livingston and Thompson strongly dissented and their reasons were fully stated by Justice Livingston who after distinguishing cases in which upon the first trial there had been no general verdict of acquittal by the jury but only a special verdict upon which the court had discharged the defendant as well as cases in which the defendant himself has suggested the imperfection in the first indictment and thereupon obtained judgment in his favor said, 'these defendants have availed themselves of no such imperfection if any there were, nor has any judgment to that effect been pronounced. This case in short presents the novel and unheard of spectacle of a public officer whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first.' "if a conviction takes place whether an indictment be good or otherwise, it is ten to one that judgment passes; for, if he reads the bill, it is not probable he will have penetration enough to discern its defects, his counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking further and the court will hardly of its own accord think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prisons on erroneous indictments who however have been fairly tried on the merits. But reverse the case and

suppose an acquittal to take place, the prosecutor, if he be dissatisfied and bent on conviction has nothing to do but tell the court that his own indictment was good for nothing and that he has a right to a second chance of convicting the prisoner and so on, "toties quoties" (1 Johns 74).

In Commonwealth vs Purchase 2 Pick. 521, 523, Chief Justice Parker speaking of the doctrine, which allows a man to be tried again after being acquitted on an indictment substantially bad, said that. "Ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment; 'but that,' is bottomed upon an assumed infallibility of the court, which is not admitted in any other case."

The Constitution of the United States in the Fifth Amendment declares "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished but against being twice put in jeopardy and the accused whether convicted or acquitted, is equally put in jeopardy at the first trial." "An acquittal before a court having no jurisdiction is of course like all the proceedings in the case absolutely void and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. (Comm. vs Peters 12 Met 387, 2 Hawk P. C. c35 sec 3) 1 Bishop Crim Law 1028. But although the indictment was fatally defective yet if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and until so avoided can not be collaterally impeached. If the judgment is upon the verdict of guilty and unreversed it stands good and warrants the punishment of the defendant accordingly and he could not be discharged by a writ of habeas corpus (Ex Parks 93 US 18). If the judgment is upon an acquittal the defendant indeed will not seek to have it reversed.

The Pleas of J. C. Ball and Boutwell can not be sustained. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein

could have been held to bar a new indictment against them need not be considered because it is quite clear that a defendant who procures judgment vs him to be set aside may be tried anew. In the Ball Case, J. C. Ball and Boutwell, appeal was directed to the fatal defect in the bill of indictment. Petitioner's case the court "ex mero motu" arrested judgment.

In Kepner vs United States 195 U. S. 100 Justice Day, May 31, 1904 it is stated; P. 130 "It is the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered although no judgment be entered on the verdict and it was found on a defective indictment. The protection is not against the peril of second punishment but against being tried for the same offense."

In Serra vs Mortiga 204 U. S. 476 Justice White, Philippine Islands, Feb. 25, 1907 stated: "Whether an act charged in an indictment is or is not a crime by the law which court administers is a question which has to be met at almost every stage of the criminal proceedings on motion to quash, demurrer, motion in arrest of judgment etc. The court may error but it has jurisdiction of the question. If it errors there is no remedy after final judgment unless a writ of error lies to some superior court."

In U. S. vs. MOWSER 92 NJL 474 106 A. 416 Court stated: "A conviction of robbery is a bar to a subsequent prosecution for murder resulting from the criminal act done in the perpetration of robbery murder. In other words when a person has been convicted the State can not on the same evidence again convict him for the same act even though the crime is designed by another name."

In Miller, Criminal Law P. 538 it is stated:

Logically a defendant is in jeopardy as soon as a formal charge of crime has been made against him. Logically he is only once in jeopardy so long as the determination of his

guilt or innocence under that charge remains undetermined, whatever stage of the proceedings.

Vol. 15 AJ p. 50 Section 375 stated:

"If the indictment on which the accused was first tried is not void but merely defective in some material matter so that a valid and legal conviction could have been procured on it notwithstanding the defect an acquittal may be pleaded in bar at a subsequent indictment for the same offense. If an acquittal is secured under a decision of the court sustaining the defendant's objection to the indictment such acquittal will not bar further proceedings whether the indictment was as matter of law sufficient to sustain a conviction or not; the defendant having procured a decision that the indictment is insufficient will not afterwards be permitted to assert that it was insufficient." Again in the instant case the Supreme Court of North Carolina "ex mero motu" arrested judgment.

In Re Nielsen 131 U. S. 176 stated:

"Where a person has been tried and convicted for a crime which has various incidents included therein he can not be a second time tried for one of these incidents without being twice put in jeopardy."

AJ Vol 15 section 382:

"It is therefore an established rule that a prosecution for any part of a single crime bars any further prosecution based on the whole or a part of the same crime. When the facts constitute only one offense although it may be susceptible of division into parts as in larceny for stealing several articles will bar a subsequent prosecution for stealing any of the other articles taken at the same time. Where several forged instruments are uttered at the same time and by the same act a conviction for uttering one of them will bar a prosecution for uttering the others."

Appellant respectfully submits that the court violated the "nemo debet bis puniri pro uno delicto" or autrefois acquit rule by indicting and trying the petitioner for breaking and entering and larceny and receiving. The Supreme Court of North Carolina in the case of State vs Bell 205 N. C. 225, STACY, C. J. "When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater. To adopt any other view would tend to destroy the efficacy of the doctrine governing second jeopardy which is embedded in our organic law as a safeguard to the liberties of the citizens. In discussing this interesting topic Mr. Bishop in volume I (5th Ed. par 1057) of his learned treatise on Criminal Law says: "But where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included as beforementioned within a larger, the question arises, whether this will bar an indictment embracing one of the larger. If it will not bar, then the prosecutor may begin with the smallest, where there are several crimes included with one another, and obtain successive convictions ending with the largest; while, if he had begun with the largest, he must there stop, a conclusion repugnant to good sense. Besides as the larger includes the smaller, it is impossible a defendant should be convicted of the larger without being convicted of the smaller; and thus if he has been already found guilty of the smaller he is when on trial for the larger in jeopardy a second time for the same, namely, the smaller offense. Some apparent authority therefore, English and American, that a jeopardy for the less is no bar to an indictment for the greater, must be regarded as unsound in principle; while the doctrine which holds it to be a bar rests firmly on adjudication also."

In Spriggs vs United States 9th Circuit 4/25/55 25 F2nd 865 the court stated:

P. 868 (note 4) It is quite clear that a defendant who procures a judgment against himself upon an indictment to be

set aside may be tried anew upon the same indictment or upon another indictment for the same offense of which he had been convicted. And as stated in DONATO VS UNITED STATES 2nd Circuit 3/18/31 "The Constitutional prohibition against double punishment is not against double punishment but against being twice put on double trial."

Applying the principles of law stated herein to the circumstances prevailent in the instant case appellant respectfully submit that his plea of autrefois acquit should have been sustained and the action dismissed. (See Burton vs United States 202 U. S. 344.)

WHERI FORE: Petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of North Caroline and the Judgment of the Supreme Court of North Carolina be reviewed and reversed.

Respectfully submitted,

Dated at Smithfield, North Carolina
June 10, 1957

E. REAMUEL TEMPLE JR.
Attorney at law for Petitioner

APPENDIX

STATE VS HAROLD F. NUGENT, LOUIS HARDY STRICKLAND, B. T. WILLIAMS AND ROMMIE GREEN 243 N. C. 100 (Filed November 9, 1955).

Appeal by defendant from FOUNTAIN, J. June 1955 Term of Wake Superior Court, Judgment arrested.

William N. Rodman Jr., Atty. Gen. and Harry McGalliard, Asst. Atty. Gen. for the State.

Carl E. Gaddy, Jr., Raleigh and E. B. Temple, Jr., Benson for defendant, appellant.

PARKER, J. The bill of indictment has two counts: one for larceny, and one for receiving stolen property knowing it to have been stolen. The description of the property in the larceny count is a "quantity of meat of the value of fifteen hundred dollars, of the goods, chattels and moneys of one R. & S. Packing Company." A similar description occurs in the receiving count. Are the descriptions of the property in the two counts of the bill of indictment sufficient? (1) It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. State vs Thorne 238 NC 392, 78 SE2d 140; State vs Scott 237 NC 432, 75 SE 2d 154; State vs Morgan 226 NC 414, 38 SE 2d 166)

(2) Art. 1 sec 11 of the North Carolina Constitution, guarantees to every person charged with crime the right to be informed of the accusation against him. This constitutional guarantee is a substantial redeclaration of the common law rule requiring the charge against the defendant to be set out in the warrant or indictment with such exactness that the defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and can enable the court, on conviction, to pronounce sentence according to law. State vs Jenkins 238 NC 396, 77 SE 2d 796; State vs Green 151 NC 729, 66 SE 564; State vs

Lunsford 150 NC 862 64 SE 765; 42 CJS., Indictment and Information, sec 90 This right of the accused is a substantial right that may not be ignored, and not a mere technical or formal right. People vs Green 368 111 242 13 NE 2d 278, 115 ALR 348.

(4, 5) G. S. 15-153 has abolished the requirement that the detailed particulars of a crime must be stated in the meticulous manner prescribed by the common law but the requirement remains that in every prosecution by warrant or indictment the defendant shall be informed of the accusation against him, and this accusation must be set forth with sufficient certainty for the purposes above stated. State vs Gibbs 234 NC 259 66 SE 2d 883; State vs Lunsford, supra.

As to the sufficiency of description of property in an indictment for larceny this is stated in a note to Jones vs State 64 Fla. 92, 59 Se. 892 LRA 1915 B 71 in the LRA volume: "To apply the rules deducible from the cases it seems that property alleged to have been taken should be described by the name usually applied to it when in the condition it was taken and where possible to state the number or quantity, kind, quality, distinguishing features etc thereof."

The case of State vs Patrick 79 N.C. 659 28 Am Rep 340 is directly in point. In that case the description of the property in the bill of indictment, to wit: "one pound of meat of the value of five cent" was held fatally defective, and the judgment was arrested. The court said: "Such articles" referring to meats "have more specific names in commerce and in the country, which ought to be employed in criminal proceedings." See State vs Moore 129 NC 494, 39 SE 626, 55 LRA 96.

In the Patrick case the court relied upon State vs Morey 2 Wis. 494, 60 Am Dec. 439. In the Morey case the description "one hundred pounds of meat of the value of fifteen dollars," was held bar for uncertainty, and the judgment was arrested. The Wisconsin court said: "In an indictment for

larceny, the property which is alleged to have been stolen, should be described with reasonable certainty; and a charge of stealing meat, which applies not only to the flesh of all animals, used for food, but in general sense to all kinds of provisions, is too vague and uncertain."

As was pointed out in State vs Patrick, supra, in State vs Jenkins 78 NC 478, the word meat is used in the syllabus and report of the case. It should have been bacon as appears from the original papers on file. The description of the property in the bill of indictment for larceny is, "five pounds of bacon."

State vs Oakley, 51 Ark. 112, 10 SE 17 was a case of larceny of money, where the court was concerned with the sufficiency of the description of the money in the bill of indictment. The court said, without citation of authority, "it has been adjudged that the description of property stolen as 'one pound of meat' was insufficient."

In State vs Allen 103 NC 433 9 SE 626 the defendant was charged with the larceny of pork, which is the flesh of swine. The description in the bill of indictment from the original papers on file is, "four hundred pounds of bacon of the value of forty dollars."

Webster's New International Dictionary, 2nd ed, defines meat: "The flesh of animals used as food****Commercially, in the United States, meat means the dressed flesh of cattle, swine, sheep, or goats except where used with a qualifying word, as in reindeer meat, crab meat." It is common knowledge that we have different kinds of dried meat and canned meat. It is well known that horse meat is used extensively as a food for dogs.

(6, 7) Applying the principles of law above stated, we reach the conclusion that the description of the property in both counts of the bill of indictment is fatally defective. The defendant has a constitutional right to have the bill of indictment state the kind of meat he is alleged to have taken or

received, so that he can know precisely what he is called upon to meet, in order to have a fair and reasonable opportunity to prepare his defense, and so that, in the event of a conviction, the record may show with accuracy the exact offense of which he was convicted.. The use of the embracive word meat in the bill of indictment has deprived the defendant of this substantial constitutional right.

(8) The defendant made no motion in the TRIAL COURT to arrest the judgment because the descriptions of the property in both counts of the bill of indictment is fatally defective. However, the defects in the bill of indictment are insurmountable and this court (EX MERO MOTU) will direct the judgment to be arrested. State vs Thorne, supra; State vs Scott, supra. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below and the State, if it so advised, may proceed against the defendant upon a sufficient bill of indictment. State vs Faulkner 241 NC 609, 86 SE 2d 81, State vs Scott, supra; State vs Sherrill 82 NC 694. (JUDGMENT ARRESTED.)

STATE VS LOUIS HARDY STRICKLAND ____ NC ____
Filed April 17, 1957

Appeal by Defendant from Sharp, S. J. June 1956 Term of Wake.

A bill of indictment was returned at the December 1955 term. It contained three counts of charging the defendant with (1) Breaking and entering (2) larceny of sixty pounds of weiners of the value of $25.00 and (3) Receiving sixty pounds of weiners of the value of $25.00 knowing them to have been stolen.

Defendant pleaded NOT GUILTY with a former plea of former jeopardy. In support of his plea of former jeopardy defendant relies on the record in the case of S. V. Strickland, heard at the July Term of Wake Superior Court, heard here on appeal at the Fall term 1955 and reported 243 NC 100 89

SE 2nd 781. During the trial, defendant moved to quash the indictment for inconsistency in the second and third counts. At the conclusion of the evidence the court sustained defendant's motion to nonsuit the third count. The jury returned a verdict of guilty on the charges of breaking and entering and larceny. Judgment of imprisonment was imposed and defendant appealed.

Attorney General Patton and Assistant Attorney General McGalliard for the State.

E. Reamuel Temple for defendant, appellant.

PER CURIAM: Defendant's plea of former jeopardy has no merit. The bill of indictment returned in July, 1955, charged no criminal offense. He is now, for the first time, charged with the criminal offense of which stands convicted. S. vs. Strickland 243 NC 100 89 SE 2d 781. The motion to quash is without merit. S. vs. Mincher 178 NC 698, 100 SE 339. Defendant's other assignments of error have been examined and have been found to be equally wanting in merit. (NO ERROR.)

N. C. G. S. 14-54: BREAKING INTO OR ENTERING HOUSES OTHERWISE THAN BURGLARIOUSLY?

If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling house of another otherwise than by a burglarious breaking; or any storehouse, shop, warehouse, banking house, countinghouse, or other building where any merchandise, chattel, money, valuable security or other personal property shall be, or any uninhabited house he shall be guilty of a felony and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years.

N. C. G. S. 14-72: The larceny of property, or the receiving of stolen goods, knowing them to be stolen, of the

value of not more than one hundred dollars, is hereby declared a misdemeanor and the punishment therefor shall be in the discretion of the court. If the larceny is from the person, or from the dwelling by breaking and entering, this section shall have no aplication: Provided, that this section shall not apply to horse stealing. In all cases of doubt the jury shall, in the verdict fix the value of the property stolen.

N. C. G. S. 14-73: The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of the stolen goods knowing them to be stolen, of the value of more than one hundred dollars.

U. S. CONSTITUTION AMENDMENT XIV, SEC. I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

BRIEF FOR RESPONDENT IN OPPOSITION

FILED
AUG 6 1957
JOHN T. FEY, Clerk

No. 280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

LOUIS HARDY STRICKLAND,

PETITIONER,

vs.

STATE OF NORTH CAROLINA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinions of the Supreme Court of North Carolina in the case of STATE v. LOUIS HARDY STRICKLAND are reported at 243 N. C. 100, and 246 N. C. 120, which are the official reports of the North Carolina Supreme Court. The opinions are fully and correctly set out in the appendix of the petitioner's petition.

QUESTION PRESENTED

WAS THE PETITIONER TWICE PUT IN JEOPARDY AND DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

STATEMENT OF THE CASE

The petitioner, Louis Hardy Strickland, seeks, by writ of certiorari, to have the United States Supreme Court review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Wake County, North Carolina, imposing sentence upon the petitioner based upon his conviction of (1) unlawful and felonious breaking and entering with intent to commit a felony and (2) the misdemeanor of larceny of sixty pounds of weiners of the value of twenty-five dollars. Prior to the above referred to judgments, the petitioner was convicted in the Superior Court of Wake County, North Carolina, of the felony of larceny of certain meat products. The petitioner appealed from such first conviction to the Supreme Court of North Carolina urging that the motion to quash the indictment should have been granted or that, on account of alleged errors in the trial, at least a new trial should have been granted. The Supreme Court of North Carolina ex mero motu arrested judgment on the ground that the indictment was fatally defective in that by reason of its vagueness no crime was charged. At the second trial above referred to, the petitioner contended that he was unlawfully being placed in jeopardy twice with respect to the same events. This defense was disallowed and, upon appeal to the Supreme Court of North Carolina, it was held that there was no error.

ARGUMENT

WHEN JUDGMENT IS ARRESTED PURSUANT TO A TRIAL BASED ON A FATALLY DEFECTIVE INDICTMENT, SUCH TRIAL HAS NOT PLACED A PETITIONER IN JEOPARDY SO AS TO BAR A SECOND TRIAL.

This proposition is well stated in 15 AM. JUR. 49 as follows:

> "The rule that former conviction or acquittal may be pleaded in bar of a second indictment for the same offense assumes that it is a lawful acquittal or conviction. *If an indictment is so defective that judgment would be arrested on conviction, as, for instance, where no*

offense is stated, then an acquittal thereon will not operate as a bar to a subsequent trial for the same offense. But if a defendant has suffered the full punishment prescribed by law, he cannot again be prosecuted for the same offense, although the judgment on which the sentence was rendered was so defective that it would have been reversed on error." (Emphasis added)

The following cases are cited in support of the above statement of the law:

SHOENER v. PENNSYLVANIA, 207 U. S. 188, 52 L. ed. 163, 28 S. Ct. 110;
BLACK v. STATE, 36 Ga. 447, 91 Am. Dec. 772, overruled on another point by BROWN v. STATE, 109 Ga. 570, 34 S. E. 1031;
BENNETT v. COM. 150 Ky. 604, 150 S. W. 806, 43 L. R.A. (N.S.) 419;
STATE v. SCHYHART (Mo.) 199 S. W. 205, citing R. C. L.;
STATE v. EMPEY, 65 Utah, 609, 239 P. 25, 44 A. L. R. 558.

In the instant case, the original conviction would have stood had not the appellant himself sought (1) to declare the first trial a nullity or (2) at least to obtain a new trial. The instant situation is distinguishable from those described by the petitioner. The petitioner here did not comply with any of the sentence imposed at the first trial.

In 22 C.J.S. 383 the general rule is stated as follows:

"Subject to the qualifications hereafter stated, the general rule is that, in order that jeopardy may attach, there must be a valid indictment, information, or complaint . . . So, where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution."

The petitioner supports the respondent's position when he writes in his petition on Pages 12 and 13 as follows:

"In SPRIGGS vs UNITED STATES 9th Circuit 4/25/55 25 F2nd 865 the court stated:

"P. 868 (note 4) It is quite clear that a defendant who

procures a judgment against himself upon an indictment to be set aside may be tried anew upon the same indictment or upon another indictment for the same offense of which he had been convicted. And as stated in DONATO vs UNITED STATES 2nd Circuit 3/18/31 "The Constitutional prohibition against double punishment is not against double punishment but against being twice put on double trial!"

The respondent did not appeal the petitioner's first conviction to the Supreme Court of North Carolina and seek to have it set aside. The petitioner appealed to the Supreme Court and secured the arrest of judgment. Although the North Carolina Supreme Court stated that it would direct that the judgment be arrested ex mero motu, the fact remains that the petitioner urged that the Supreme Court hold it error for the trial court to have failed to allow the motion to quash the indictment in the original case (Record, STATE v. LOUIS HARDY STRICKLAND, pp 11 and 46).

CONCLUSION

The petitioner was not improperly placed in double jeopardy because the first trial was based upon a fatally defective indictment and judgment in said trial was arrested pursuant to an appeal to the Supreme Court of North Carolina by the petitioner who sought to have the indictment quashed or at least to be granted a new trial. Under such circumstances, such first trial does not bar a second trial.

Respectfully submitted,

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